IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

TUESDAY, THE 6TH MARCH 2007 / 15TH PHALGUNA 1928

Crl.MC.No. 1777 of 2006()

CP.43/2006 of JUDL.MAGISTRATE OF FIRST CLASS COURT-II,PATHANAMTHITTA

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PETITIONER:

SUNIL KUMAR,
S/O.GANGADHARAN,
SUB INSPECTOR OF POLICE,
THANNYTHODE POLICE STATION,
RESIDING AT SHANTHA SADANAM,
CHERUKAV, PUNALUR.

BY ADV. SRI.C.S.MANILAL

RESPONDENTS:

STATE OF KERALA,
REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

ADDL.2. SHAJI, S/O. SUKUMARAN,
ANJUMARUTHIYIL,
THANNITHODE,
KONNI THAZHAM VILLAGE,
PATHANAMTHITTA.

ADDL.R2 IS IMPLEADED AS PER ORDER DATED 19/7/06 IN CRL.M.A.NO.3608/06.

BY P.P. SRI.S.U. NAZAR.
BY ADV. SRI.S.MUHAMMED HANEEFF

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 06/03/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

CRL.M.C.NO. 1777 OF 2006

Dated this the 6th day of March, 2007

ORDER

The petitioner is the Sub Inspector of Police of Thannithode Police Station and an accused in C.P.No.43/06, inter alia, under Sec.307 of the IPC pending before the Judicial First Class Magistrate's Court-II, Pathanamthitta. The petitioner is the 1st accused and a Police Constable on duty along with him is arrayed as the 2nd accused. Cognizance was taken on the basis of a complaint made by the complainant who was arrested by the petitioner and produced before the learned Magistrate on 18/6/06 at 3.45 p.m. The crux of the allegations is that the accused persons – the Sub Inspector of Police and the Police Constable, attempted to cause the death of the complainant by strangulating him by applying constrictive force around his neck using a towel. He was allegedly assaulted also.

3. The petitioner submits that cognizance taken by the learned Magistrate is unsustainable in law as it violates the

mandate of Sec.197(3) of the Cr.P.C. This question appears to have been considered by the learned Magistrate and the learned Magistrate states so in the order dated 19/6/06 on the relevant aspect:

> "Though A1 and A2 are public servant, sanction of the State Government is not required for taking cognizance against them since they are removable from their office without the sanction of the government and offence complained of cannot be considered as the offences committed while acting or purported to act in the discharge of their official duty. So there is no bar in taking cognizance of the above offences against them."

4. The learned counsel for the petitioner submits that the process of reasoning by which the learned Magistrate came to the conclusion that cognizance can be taken even without the requisite sanction under Sec.197 of the Cr.P.C. is incorrect, improper and perverse. First of all, it is contended that the Notification dated 6/12/1977 issued under Sec.197(3) of the

Cr.P.C. is squarely applicable and must protect the petitioner who is a member of the police force which in turn is engaged in the maintenance of law and order.

5. The question whether persons like the petitioner who are members of the Kerala Police engaged in maintenance of law and order are entitled to the protection of the Notification dated 6/12/77 was considered by a single Bench of this Court in **Muhammed v. Sasi** (1985 KLT 404). Though it was held that such sanction is not necessary for persons engaged in law and order duty, in contra distinction of maintenance of public order, that decision stands overruled by the decision in **Sarojini v. Prasannan** (1996 (2) KLT 859). It is perhaps not necessary to place reliance on the decision of the Division Bench in **Sarojini v. Prasannan** (1996 (2) KLT 859) inasmuch as the Supreme Court later in **Rizwan Ahmed Javed Shaikh v. Jammal Patel** (2001 SC 2198) has made it clear that the question is only whether the officer claiming protection under Sec.197(3) of the Cr.P.C. belongs to the police force which in turn is charged with responsibility of maintenance of public order/law and order. In the light of the dictum in **Sarojini v. Prasannan** (1996 (2) KLT 859) and **Rizwan Ahmed Javed Shaikh v. Jammal Patel** (2001

SC 2198), the reasoning of the learned Magistrate based on the former part – that the sanction is not required for persons like the petitioner, cannot obviously be accepted. The learned counsel for the respondent/complainant does not also seriously support the said conclusion of the learned Magistrate in the light of the clear pronouncements referred above.

6. The learned counsel for the respondent/complainant, however, submits that the alleged overt acts against the complainant cannot be said to be the acts done in the discharge of his official duty or in the purported discharge of his official duty.

7. To the crucial facts first. It is the case of the petitioner that the accused had to be arrested in connection with Annexure-I crime registered under Sec.8(1) of the Kerala Abkari Act. That crime was registered on 17/6/01. In the First Information Statement it is clearly alleged that the complainant herein was coming in an autorikshaw; that he tried to get out of the autorikshaw holding a plastic cannas; that the police party stopped their vehicle and tried to apprehend him; that he tried to escape and that the requisite force had to be employed to apprehend him. This is the very clear case of the petitioner in

the First Information Statement lodged in Annexure-I crime in which the petitioner was arrested. There is no dispute before me that the petitioner was arrested as accused in this crime and was produced before the learned Magistrate. The oral complaint on the basis of which cognizance was taken was given by the complainant when he was so produced before the learned Magistrate.

8. Going by the averments made in the complaint as also in the sworn statement it is transparently evident that the very allegation of the complainant himself is that violence was employed on him when the police party apprehended him and took him to the police jeep and thereafter.

9. Thus, that the alleged violence was employed in the course of the alleged attempt to apprehend the accused as an accused in the offence under the Abkari Act, appears to be very clear. But the learned counsel for the complainant contends that the nature of the acts which are alleged in the case must reveal that it was not a honest or bona fide exercise of the function/duty of arrest in an abkari offence. The learned counsel for the complainant draws my attention to the specific and precise allegation that a towel was used around the neck of

the complainant to apply constrictive force.

10. The crucial question is whether the act alleged can be said to be committed in the discharge of his official duty or in the purported discharge of his official duty. The width and amplitude of the words "while acting or purporting to act in the discharge of official duty" have been the subject matter of consideration in many cases. If a very restricted interpretation were accepted, it would render the provisions of Sec.197 of the Cr.P.C. sterile as it cannot be held to be the part of the official duty of any public servant to commit any offence. At the same time if too wide an interpretation in force of the public official were accepted, the private citizen will remain without efficacious remedy when his rights are trammelled by officials exercising their functions. It is unnecessary to advert to the various precedents. The real test to be employed is considered in detail in para-15 of **Rizwan Ahmed Javed Shaikh v. Jammal Patel** (2001 SC 2198) in the following words:

> "The real test to be applied to attract the applicability of Section 197(3) is whether the act which is done by a public

> officer and is alleged to constitute an offence was done by the public officer whilst acting in his official capacity though what he did was neither his duty nor his right to do as such public officer. The act complained of may be in exercise of the duty or in the absence of such duty or in dereliction of the duty, if the act complained of is done while acting as the public officer and in the course of the same transaction in which the official duty was performed or purports to be performed, the public officer would be protected."

That test has been referred to with approval by the Supreme Court in the latest decision on this aspect in **Sankaran Moitra v. Sadhna Das** (AIR 2006 SC 1599).

11. It can certainly be held that it is not the official duty of the public servant to use the towel around the neck of the accused person to be apprehended and tighten the same. But, according to me, it may not be proper to come to a conclusion that the alleged act is so totally outside the official duty or purported official duty of the official concerned as to lead the court to a conclusion that he is not entitled to the protection

under Sec.197 of the Cr.P.C. The purpose of Sec.197 of the Cr.P.C. is to afford the public servant protection subject to the grant of sanction by the Government against unnecessary indictment by persons on whose feet he may have to tread while discharging his official duty. So considered, I am of opinion that it cannot at all be held that the alleged conduct is so alien to the official act which the petitioner and the co-accused were performing as to deprive them of the protection under Sec.197 (3) of the Cr.P.C. on the basis of the Notification dated 6/12/77.

12. In the result, this Crl.M.C. is allowed. The impugned order taking cognizance against the petitioner and his co-accused (the Police Constable) and the registration of C.P.No.43/06 against them are set aside. I may, however, hasten to observe that it shall be open to the complainant to initiate steps to prosecute the accused persons after obtaining the requisite sanction.

(R. BASANT, JUDGE)

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